Lake Development Management Co. *and* the Greater New Orleans Maintenance Employees Association (GNOMEA). Cases 15-CA-7751-4, 15-CA-7915, and 15-RC-6650[1]

December 21, 1981

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 5, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs and Respondent filed cross-exceptions and a brief in support thereof and in response to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] recommendations,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by announcing and granting a change in its vacation benefits on August 1, 1980, for its maintenance employees. While we agree with his conclusion, we do so only for the following reasons.

Before March 1, 1980, both full-time maintenance employees and salaried personnel received 5 days of vacation after 1 year of employment and 10 days after 2 years. On March 1, prior to the onset of union activity, Respondent issued two separate notices which granted salaried personnel 10 days of vacation after 1 year but reaffirmed its prior policy with respect to the maintenance employees. On August 1, 1980, prior to the August 20 representation election but after the beginning of the organizational campaign, Respondent issued a new notice regarding the maintenance employees' vacation policy. This notice read, in part, as follows:

> Note—this new policy on paid vacation applies to new hourly full time maintenance personnel hired as of 3/1/80:
>
> After 1 year employment—10 days paid vacation and each year thereafter.
>
> * * * * *
>
> Note—prior to this date of 3/1/80, full time hourly maintenance personnel vacation policy stays as such:
>
> After 1 year employment—5 days paid vacation.
>
> After 2 years employment—10 days paid vacation and each year thereafter.

Thus, employees hired after March 1 received 10 days' vacation after 1 year, but those hired before

[1] The Administrative Law Judge inadvertently omitted the numbers of Cases 15-CA-7915 and 15-RC-6650 from the caption of his Decision.

[2] The General Counsel, the Charging Party, and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III, A, of his Decision, the Administrative Law Judge refers to Supervisor Allen Barry as Joseph Alfred Barry. He also states that a consent agreement was reached in the representation proceeding herein, whereas the election was conducted pursuant to the Acting Regional Director's Decision and Direction of Election. These inadvertent errors are insufficient to affect our decision.

[3] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's recommendations that the challenges to the ballots of employees Roberson, Capretto, Johnson, David, Carroll, Giroux, Gossen, and Hurlbert be overruled.

[4] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's conclusion that Respondent did not violate the Act in unilaterally changing its health, accident, and life insurance plan by assuming the entire cost of the premiums.

We adopt the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by discharging employees Gilbert, Bennett, and Toups for refusing to accept overtime assignments in the form of "beeper duty" on June 23, 1980. In so doing, we emphasize that it appears that beeper duty was mandatory in the past, as is evidenced by employee Melanta's admission that he was once told he was "going to need to take [the beeper]" and that he did so even though he originally was not interested in volunteering. We further find that, even assuming, *arguendo*, that beeper duty previously had been voluntary, it is clear that on June 23 it was mandatory, and that Respondent fully apprised the employees that it was mandatory. Furthermore, we note that there is no allegation or evidence that the imposition of mandatory beeper duty was for discriminatory reasons, that it has not been shown that Gilbert, Bennett, and Toups were selected for beeper duty on a discriminatory basis, and that the employees intended their refusal to accept beeper duty to be on a continuing basis. Accordingly, we conclude that the employees were engaged in an intermittent partial strike and that Respondent could lawfully discharge them. *John S. Swift Company, Inc.*, 124 NLRB 394, 397 (1959).

We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by President Artigues' threat to discharge employees for their union activity during her discussion with employee Gilbert concerning a union meeting. In so doing, we find without merit Respondent's contention that no such violation should be found because Artigues' threat was effectively retracted. Thus, even accepting the record testimony that Maintenance Manager Solari, at Artigues' instruction, subsequently told the employees they could attend union meetings without fear of termination, we conclude that such statement did not amount to an effective repudiation of unlawful conduct and therefore did not relieve Respondent of liability for its unlawful conduct. In this regard, Solari's statement did not disavow Artigues' threat as unlawful, disavow her other contemporaneous unlawful conduct of interrogating Gilbert, or give assurance to employees that Respondent in the future would not interfere with their exercise of Sec. 7 rights. Additionally, Respondent subsequently violated Sec. 8(a)(1) of the Act by threatening employees with reprisals for engaging in union activity and by changing its vacation policy. See, e.g., *United States Postal Service*, 253 NLRB 1203 (1981); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

March 1 received 10 days' vacation only after 2 years.[5]

Absent an affirmative showing of some legitimate business reason for the timing, an inference of improper motivation and improper interference with employee rights may be drawn from a grant of benefits which coincides with employee union activity. *J. P. Stevens and Company, Inc.*, 247 NLRB 420, 431–433 (1980); *The May Department Stores Company*, 191 NLRB 928 (1971). Respondent, in arguing that it has made such a showing, contends that the August 1 notice was not an announcement of increased benefits but rather a corrected statement of the policy then in effect. It therefore contends that prior to March it had decided to give all its employees 10 days' vacation after 1 year, that due to an administrative error the notice to maintenance employees did not reflect this change, and that it was not aware of the error until unidentified employees pointed it out to President Artigues in July, at which time she directed the preparation and posting of the August 1 notice. We find Respondent's contentions unpersuasive. Thus, despite Artigues' testimony that prior to March Respondent decided to grant all its employees 10 days' vacation after 1 year, there is no documentary evidence to support her bald assertion. Furthermore, there is no showing Respondent had a consistent past practice of granting all employees the same benefits; to the contrary, prior to May 1978, after 2 years salaried employees received 10 days of vacation, but maintenance employees received only 5 days. Additionally, although she testified that she did not see the March 1 notice before it issued, she also testified that she generally reviewed notices issuing from her office. We also note that although according to Artigues no employee pointed out the alleged error to her until sometime in July, nearly 5 months later, she also testified that the employees would normally have received the March 1 notice in their pay envelopes. Finally, we note that the August 1 notice failed to correct the alleged error, as it limited maintenance employees hired before March 1 to only 5 days of vacation after their first year of employment. It is unlikely that, after issuing an allegedly erroneous statement of its new vacation policy on March 1, Respondent would fail to remedy fully the alleged error in the August 1 notice.

In light of the above factors, we find that Respondent has not affirmatively shown legitimate business reasons for its actions. Accordingly, we conclude that, by issuing the August 1 notice announcing and granting improved vacation benefits to the maintenance employees shortly before the election, Respondent interfered with the employees' rights in violation of Section 8(a)(1) of the Act.

2. Based on his finding that Artigues asked Gilbert what his grievances were and that Gilbert answered that Respondent had failed to give him a 50-cent-per-hour pay increase, the Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances. Although we agree with the Administrative Law Judge's finding that Artigues questioned Gilbert on June 18 regarding his grievances, we do not agree that this question constituted an unlawful solicitation of grievances. While the solicitation of grievances raises an inference that the employer is promising to correct those inequities it discovers as a result of its inquiries, this inference is rebuttable by the employer. *Cutting, Incorporated*, 255 NLRB 534 (1981); *Uarco Incorporated*, 216 NLRB 1 (1974). We find that the inference of such a promise has been rebutted here. Thus, Artigues testified without contradiction that, after Gilbert told her he was unhappy with his salary increase, she told him that Maintenance Manager Solari gave the salary increases and that, if that were the decision, he would stand behind it. This express statement that she would not take corrective action regarding Gilbert's grievances negated any possible inference of a promise to cure his grievances. Accordingly, we conclude that Respondent did not violate Section 8(a)(1) of the Act by soliciting employee complaints and grievances. However, we conclude that Artigues, by questioning Gilbert about his grievances, sought to determine his reasons for supporting the Union, and that Respondent thereby engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.[6]

3. Respondent excepts to the Administrative Law Judge's recommendation that the challenge to the ballot of Willie Clark be overruled. We find merit in this exception.

Artigues testified that Clark was employed for approximately 1 week prior to the beginning of the strike on June 23, 1980, and that he did not return

[5] Following the election, on August 29, Respondent issued a revised version of the August 1 notice which granted all maintenance employees 10 days' vacation after 1 year. The Administrative Law Judge, in concluding that Respondent violated the Act by announcing a change in its vacation benefits on August 1, relied on the August 29 notice, which he incorrectly stated was issued August 1 and which was not alleged to be unlawful.

[6] Member Jenkins agrees that Artigues' questioning of Gilbert constituted unlawful interrogation in violation of Sec. 8(a)(1) of the Act. However, he adheres to his view, as fully set forth in his dissent in *Uarco Incorporated, supra*, that the mere solicitation of grievances is itself coercive conduct violative of Sec. 8(a)(1) of the Act. See also his separate position in *Cutting, Incorporated, supra*. Accordingly, Member Jenkins additionally would find that Respondent coerced Gilbert in violation of Sec. 8(a)(1) of the Act by its solicitation of employee grievances.

to work with the other employees following the end of the strike. Clark testified that he was employed by Respondent as a maintenance man for 2 to 3 weeks before he went out on strike, that on August 1 he obtained employment elsewhere as a maintenance man, and that since obtaining that employment he had never had any intention of returning to work for Respondent. He also testified that in September the Union's consultant informed him that Respondent had offered him reinstatement, and that he advised the consultant that he had decided not to return to Respondent.

The Administrative Law Judge noted that there is a presumption of continued eligibility for an economic striker, and that such presumption is not rebutted by the mere fact that the striker takes a job elsewhere. *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). He found that apart from Clark's having obtained another job there was no evidence that Clark had abandoned his employment with Respondent. Accordingly, he recommended the challenge to Clark's ballot be overruled.

Contrary to the Administrative Law Judge, we find that Respondent has presented evidence rebutting the presumption of continued eligibility. Thus, Clark testified not only that he obtained other employment before the election, but also that he at no time thereafter had any intention of returning to work for Respondent. The conclusion that Clark in fact never had any intention of returning to work for Respondent is further supported by the absence of any evidence that after obtaining new employment he manifested any interest in the affairs of Respondent and by his failure to accept Respondent's offer of reinstatement. Accordingly, we conclude that by and before the August 20 election Clark had abandoned any interest in employment by Respondent and that the challenge to his ballot should be sustained.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Lake Development Management Co., Metairie, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED with respect to the election conducted in Case 15-RC-6650 on August 20, 1981, that the challenges to the ballots cast by Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, Richard Williams, James Roberson, David Capretto, Jeff Johnson, Paul David, Frank Carroll, Mike Giroux, Robert Gossen, and Lloyd Hurlbert be, and they hereby are, overruled, and that the challenges to the ballots cast by Willie Clark, Henry Gonzales, Ronald Bennett, Robert Gilbert, and Allen Toups be, and they hereby are, sustained.

DIRECTION

It is hereby directed that the Regional Director for Region 15 shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots cast by Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, Richard Williams, James Roberson, David Capretto, Jeff Johnson, Paul David, Fank Carroll, Mike Giroux, Robert Gossen, and Lloyd Hurlbert in the election conducted in Case 15-RC-6650 on August 20, 1980, and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon the basis of which he shall issue the appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge or other reprisals should they engage in union or other activity for their mutual aid or protection.

WE WILL NOT interrogate our employees concerning their interest in or activity on behalf of Greater New Orleans Maintenance Employees Association (GNOMEA).

WE WILL NOT interfere with employee freedom of choice by instituting or announcing the

institution of benefits to employees during the course of a union organizational campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LAKE DEVELOPMENT MANAGEMENT CO.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on February 18-20, 1981, at New Orleans, Louisiana, upon the General Counsel's complaint which alleged principally that on June 23, 1980,[1] the Respondent discharged three employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The General Counsel further alleges that this unfair labor practice precipitated a strike of other employees; that the Respondent engaged in several violations of Section 8(a)(1); and that the Respondent by its unilateral institution of certain employee benefits on or about November 1 violated Section 8(a)(5) of the Act, should the Union be certified as the employees' collective-bargaining representative.

The Respondent generally denied that it committed any unfair labor practices and specifically alleges that the three employees were discharged for cause on June 23—for refusing, in effect, an overtime assignment. The Respondent further contends that the strike was economic; that its supervisors did not threaten or interrogate employees; and that, even if the Union should be certified as the employees' collective-bargaining representative, it had the right, during the pendency of these proceedings, to change the insurance benefits program.

Consolidated with the unfair labor practice allegations is the hearing on challenged ballots in Case 15-RC-6650.

Upon the record as a whole, including my observation of the witnesses and excellent briefs submitted by counsel for the General Counsel and the Respondent, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

Lake Development Management Co. (herein the Respondent, the Company, or the Employer) is a partnership engaged in the business of managing about 5,000 apartment units in 40 complexes in the greater New Orleans area. The Respondent has about 200 employees of whom about 75 are hourly paid. Most of the hourly employees are maintenance men divided generally into two groups. Specifically there are one or two onsite maintenance men at the larger complexes and the others work out of a central location. The central maintenance group are the principals involved in this matter.

In the course and conduct of its business, the Respondent annually receives goods and revenues in excess of $500,000 and annually purchases and receives goods directly from points outside the State of Louisiana valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Greater New Orleans Maintenance Employees Association (herein the Union) was formed on or about June 16 by employees Robert Gilbert and Ronald Bennett, with assistance from Richard Allen Neville, who styles himself a labor relations consultant and so appeared at the hearing of this matter. However, there is testimony that he advised employees that he is an attorney licensed to practice in New England.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Principal Facts*

During the times material there were nine central maintenance employees supervised by Joseph Alfred Barry and Clarence Thomas Johnson and more remotely by Alvin F. Solari, the general property manager. These employees worked Monday through Friday from 8 a.m. until 5 p.m. and earned from $6 to $7, or so, per hour. In addition these employees were occasionally allowed to do specific maintenance jobs on a contract basis after hours and were given the opportunity to carry a beeper.

The Respondent's beeper system is the core of this controversy. Beepers are used by the Respondent primarily as a means of contacting maintenance employees for after-hours emergency service, although some maintenance employees carry beepers throughout the normal workday. The beepers are fixed channel radio receivers which one can carry and through which one can be reached by telephone for short messages. Usually the beeper carrier then follows up by placing a telephone call.

Until about April the Respondent had two beepers. Then two more were added. Thus during the time material here, the Respondent used four beepers, each of which was for certain designated apartments.

The pay week, and hence beeper duty, runs from Thursday through Wednesday. Each Thursday morning the four beepers would be on a table in the central maintenance area for employees to take and keep for 1 week. An employee carrying a beeper would be compensated $75 for the week. He would be expected to answer any calls and if necessary physically go to the appropriate apartment and perform the necessary maintenance service. Employees sometimes carried more than one beeper, substituting for the one originally on duty.

The number of messages one would receive, and after-hours calls one would have to make, varied substantially. The evidence on this is far from conclusive, although it is clear that most employees carrying the beepers were

[1] All dates are in 1980 unless otherwise indicated.

simply oncall. Most hours they neither responded to messages nor performed any kind of maintenance function.

For reasons unstated in the record, on June 16 Robert Gilbert decided to form a union. He and Ronald Bennett met with Neville and they determined to have an organizational meeting in Neville's apartment on the evening of June 18. That morning Gilbert posted a notice to this effect on the bulletin board of the maintenance lounge. At this time he had a discussion with Barry about the Union, *infra*, and later that day was called into the office of the Respondent's president, Patricia Artigues, *infra*.

At the employees' meeting on June 18, among other things Neville told them that the Company was in violation of the Fair Labor Standards Act with regard to the beeper system. He told them, or at least led them to believe, that when carrying a beeper they were entitled to be paid at the rate of one and one half-times their hourly rate for each hour. Gilbert, for instance, testified that he was then earning $7.25 an hour and was advised that when carrying the beeper he would be entitled to one and one-half times that amount for 128 hours each week (5 p.m. to 8 a.m. Monday through Saturday plus 48 hours from 8 a.m. Saturday to 8 a.m. Monday). Gilbert testified that he was led to believe, and presumably so were the others, that the Company should be paying him some $1,300 a week extra for carrying the beeper.

Neville further advised these employees that inasmuch as the Company was in violation of the Fair Labor Standards Act, if they continued the practice of taking the beepers for $75 a week that they too would be in violation of the Federal law.[2]

After being advised by Neville that they should have been paid substantially more for carrying the beeper, all those at the June 18 meeting determined that they would not carry the beeper until the Respondent agreed to pay them their due.

Thus on Thursday, June 19, the beepers were set out as usual but none was taken. Barry asked if anyone was going to take a beeper but they all declined, telling him that they would not carry the beepers unless the Company paid them what they were entitled. About 5 o'clock that afternoon and again about 4:45 p.m. on Friday, Barry asked each of the maintenance employees if he would take a beeper and each refused. He told them that their continued refusal to take the beepers could result in their discharges.

Sometime after the employees first announced that they would refuse to carry the beepers, and were threatened with possible discharge for failure to do so, they all agreed that should any one of them be discharged for failure to carry a beeper the others would go on strike. They agreed to "stick together."

On Monday, June 23, the maintenance employees were called together again, were asked to take the beepers and were told by Barry that if they refused, beepers would be assigned to individuals and if those individuals refused to take them they would be discharged. They continued to refuse.

Then Bennett, Gilbert, and Allen Toups were selected for specific assignment because, according to Barry, in the previous 3 months these individuals had beeper duty the least of any then active employee. Each refused to take the beeper and each was discharged. Bennett testified, for instance,

> When I refused to take the beeper, Al Barry told me that refusing to take the beeper—he's to be terminated for refusing to take the beeper. Then, Mr. Solari said, "Ron, read this paper first."
>
> Q. Okay.
>
> A. And I read the paper.
>
> Q. And then, you were asked again weren't you?
>
> A. Yes.
>
> Q. And you still refused, didn't you?
>
> A. Yes.

Most of the remaining maintenance employees, pursuant to their agreement among themselves, then went on strike to protest the Respondent's alleged unfair labor practice.

On June 19, Neville filed a petition for representation on behalf of the Union. A consent agreement was reached. The Union waived blocking by the unfair labor practice charge, and an election was held on August 20. There were 3 votes cast for the Union and 4 cast against it, with 26 challenged ballots. Generally, the ballots challenged by the Union were cast by individuals who replaced the striking employees. Generally, the ballots challenged by the Respondent were of those individuals the Respondent contends were terminated for cause or had abandoned their employment.

B. *Contentions of the Parties*

The General Counsel alleges that the discharges of Bennett, Gilbert, and Toups were violative of Section 8(a)(3) because they were discharged for having engaged in protected concerted activity, namely, refusing to carry the beepers without being appropriately compensated under the Fair Labor Standards Act; and, alternatively, because they had engaged in activity on behalf of the Union.

The General Counsel further contends that the strike of employees was precipitated by the Respondent's unfair labor practice of discharging these individuals.

It is also alleged that the Respondent engaged in violations of Section 8(a)(1) when Barry and then Artigues confronted Gilbert on June 18 and that the Respondent violated Section 8(a)(1) on August 1 by posting new vacation holiday rules which applied to strike replacements.

Finally, the General Counsel contends that, if the Union is certified as the collective-bargaining representa-

[2] The General Counsel offered to prove that employees carrying the beepers averaged from 10 to 20 hours of work a week, and sought to litigate here the issue of whether or not they were appropriately compensated under the Fair Labor Standards Act. I conclude that the Board is not the appropriate forum to decide that issue. However, notice is taken of 29 C.F.R. 785.17 which provides that employees oncall away from the employer's premises are not entitled to pay for that time. Inasmuch as the facts demonstrate that these employees were oncall and did not actually do any work more than a few hours each week (even assuming the General Counsel's offer), it is clear that the Respondent was not liable to pay them anything remotely close to time and one-half their hourly rate for 128 hours a week. Whether the $75 a week was sufficient under the Fair Labor Standards Act is for another tribunal to decide.

tive of the employees, the Respondent violated Section 8(a)(5) of the Act by unilaterally instituting changes in insurance coverage effective November 1.

In addition to the matters alleged by the General Counsel, the Union contends that its challenges to certain ballots should be sustained and those of the Respondent should be overruled.

The Respondent argues that Gilbert, Bennett, and Toups were discharged for having engaged in the unprotected act of a partial work stoppage—refusing an overtime assignment. The Respondent argues that the following strike was economic and therefore replacements were eligible to vote in the election.

The Respondent further contends that the conversations Barry and Artigues had with Gilbert on June 18 did not contain threats or interrogation in violation of Section 8(a)(1).

The Respondent claims that the announcement of vacation and holiday benefits on August 1 was simply a correction of a plan put into effect in March and therefore was not violative of Section 8(a)(1).

And, finally, the Respondent argues that, even though it unilaterally implemented a change in insurance coverage, it had the right to do so pending resolution of the challenged ballots to the election. Thus, even if the Union is certified, it should not be held to have violated Section 8(a)(5).

The Respondent also suggests that its challenges should be sustained and those of the Union should be overruled.

C. *Analysis and Concluding Findings*

1. The discharges

Principally the General Counsel contends that the employees had the protected right to refuse to take the beepers (a) because accepting a beeper assignment was voluntary and (b) because the Company was in violation of the Fair Labor Standards Act in its compensation to employees who carried the beepers. I disagree on both accounts.

The General Counsel concedes that beeper assignment was overtime and that the employees acted in concert in refusing. And the General Counsel recognizes the general proposition that refusal to work overtime is unprotected activity since such is an attempt by employees to prescribe for themselves their terms of work. "The Board and the courts have squarely held that such a refusal to work provides the employer with valid ground for discharge." *John S. Swift Company, Inc.*, 124 NLRB 394, 397 (1959).

The General Counsel's argument is founded on the assertion that beeper assignment had been voluntary and therefore did not constitute a routine part of the maintenance employees' duties. Refusal to do the work, therefore, was protected strike activity, citing *Polytech Incorporated*, 195 NLRB 695 (1972); *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); and *First National Bank of Omaha*, 171 NLRB 1145 (1968).

In analyzing whether a particular act of refusing overtime is protected or not the Board often focuses on whether it is mandatory. Thus, in *GAIU Local 13-B, Graphic Arts International Union (Western Publishing Co., Inc.)*, 252 NLRB 936, 938 (1980):

> It is also clear that the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike.

In *The Dow Chemical Company*, 152 NLRB 1150 (1965), weekend overtime was voluntary; hence to refuse it was protected activity. And more recently in *Jasta Manufacturing Company, Inc.*, 246 NLRB 48 (1979) (Member Penello dissenting), 2 hours a day overtime had always been voluntary. The company intended to change this but did not tell employees the voluntary nature of the overtime had been changed nor that they would be disciplined if they refused. Then without warning, four employees were discharged. The Board refused to conclude that by not working an hour on three occasions "they lost protection of the Act because they sought to impose on Respondent their own terms and conditions of employment."

In *John S. Swift Company, Inc., supra* at 397, the Board rejected a semantic argument similar to that made here by the General Counsel:

> We find no basis in this record for the distinction drawn by the Trial Examiner that the employees were not "ordered," but were merely requested, to work overtime. It is quite clear that the Respondent's intention was to order them, under pain of discharge, to work overtime, and the employees could not have understood it otherwise . . . .

The General Counsel places substantial emphasis on testimony that when hired none of the maintenance men were told that taking a beeper would be mandatory. However, what one remembers he was not told a year or more before a hearing is not as probative as an analysis of the work itself.

The Respondent had 5,000 apartment units. Without question it needed some method of providing emergency maintenance service on a regular basis. The beeper system filled this need.

Beyond this, the record is clear that prior to the events here neither the Respondent nor the employees thought in terms of whether beeper duty was mandatory. It was available for those who wanted to make some extra money. The duty was sufficiently desirable so that there was no lack of volunteers—except one time.

In early June, according to Barry, he could not get enough volunteers for the beeper and thus told employee Joseph C. Melanta (Milano in Barry's testimony) to take it. Melanta testified that the beeper was never assigned to him and it was "all voluntary." However, on cross-examination he testified to a time when Barry told him he would have to take a beeper, whereupon, "I decided I'd go ahead and take it because I could use the extra money."

There is no question that having maintenance employees on call was important to the Respondent's business; that emergency service was a job function required to be

performed by maintenance employees and had in fact been done by maintenance employees for many years. And as the number of apartments increased so did the number of beepers.

That the Respondent was able to provide service by using supervisors from June 19 to June 23 is beside the point. The Respondent had a right to require of its employees that they be available for emergency service on a regular basis, and such is what they were refusing.

This work was not the kind of overtime which employees could take or not, as in *Dow Chemical* or *Jasta Manufacturing*. Nor was the refusal a one-time matter as in *Polytech*.

They were refusing to take the beepers in order to force the Employer to meet their pay demand with regard to them. Their announced intention was to continue refusing the beepers. But they were as clearly unwilling to accept status as strikers.

Certainly employees have a right to protest an employer's perceived violation of Federal law. If they do so concertedly such acts are generally protected, even if they are wrong. But the issue is not whether the Employer violated the Fair Labor Standards Act (as contended by the General Counsel) but whether the employees' concerted activity lost its protected character because of the means used. I conclude it did.

Had the employees protested the alleged violation of the Fair Labor Standards Act by a general strike, for instance, such would have been protected. However, the means chosen here was that of a partial work stoppage.

It may be that the method of compensating these individuals for beeper duty was violative of the Fair Labor Standards Act; however, that is far from obvious. What is obvious is that employees were not entitled to anything close to $1,300 a week for being on emergency call. In any event, the employees did not have the protected right to press their contention by means of a partial strike.

Finally, a crucial fact found wanting in those cases where the refusal to work overtime was held protected was present here. Here the Respondent warned the employees of possible discharge, and continued to the time of the discharges to try to persuade them to accept the beepers.

The General Counsel alternatively contends that Bennett, Gilbert, and Toups were discharged because they engaged in union activity, in view of the timing of the discharges, the Company's demonstrated animus, *infra*, and knowledge that Bennett and Gilbert were the Union's two leaders.

While timing, knowledge, and animus are factors from which an antiunion motive may be inferred, such an inference here is not warranted. The overwhelming evidence is that these employees were discharged because, and only because, they refused to take beepers when assigned to do so on June 23. The employees initiated the beeper confrontation when on Thursday they concertedly refused them. And this confrontation continued to Monday when the Respondent decided to make specific assignments, and discharge employees if necessary.

Barry kept a list of how often employees had had a beeper since April, when two beepers were added. He determined that Gilbert, Bennett, and Toups had the fewest weeks.[3] Although the Respondent had four beepers to be used, it could not be determined who should be assigned the fourth one because two employees were tied. Thus, for purposes of assignment on June 23, the Respondent decided to assign three beepers, and to terminate those employees who refused them.

There is simply no basis on this record to infer that Toups, Bennett, or Gilbert would have been discharged on June 23 absent their refusal to accept an assignment of a beeper. Indeed, they were warned again and again that refusal would mean discharge. Bennett was told before making his final decision to read the discharge letter. I believe, and conclude, that had any one of them accepted the assignment he would not have been terminated. I therefore conclude that the General Counsel did not establish by a preponderance of the credible evidence, through reasonable inference or otherwise, that the union activity of these three employees, or others, played any part in their discharge other than that associated with their decision to refuse beeper duty. The discharges of Gilbert, Bennett, and Toups on June 23 were not violative of Section 8(a)(1) or (3) of the Act.[4]

2. The strike

Although the Respondent through Barry and Artigues did commit some violations of Section 8(a)(1) on June 18, *infra*, it is clear from the testimony of the General Counsel's witnesses that these matters played no part in the strike. The sole basis of the strike was the employees' decision to "stick together." They struck because Gilbert, Bennett, and Toups were discharged. Inasmuch as I concluded that the discharge of these individuals was not an unfair labor practice, I necessarily conclude that the strike was not an unfair labor practice strike. It was, and remained, an economic strike, which is material only to eligibility of voters in the representation matter, *infra*.

3. The 8(a)(1) activity

a. *Allen Barry*

It is alleged that on June 18 after Gilbert posted the notice of the union meeting Barry threatened employees with more onerous working conditions, threatened employees with discharge if they selected the Union, impliedly promised employees increased benefits, and solicited employee complaints and grievances.

It is generally undisputed that following the posting of the notice Barry made several comments to the assembled maintenance employees. While the testimony of the General Counsel's witnesses is somewhat conflicting, basically all agree that Barry said employees were "going

[3] To the extent that Bennett's testimony conflicts with Barry's list, I discredit Bennett. The list was made up, and seen, prior to any of the events here.

[4] In view of this conclusion, it is unnecessary to decide the Respondent's assertion that Bennett and Gilbert, having been deemed uninsurable by their automobile insurance carrier, would not be entitled to reinstatement or that Bennett engaged in sufficient post-discharge misconduct to render him unemployable.

to get hurt by attending meetings and stuff like this" and that "the Union would only get us in trouble."

From the generally credible testimony of the General Counsel's witnesses, I do conclude that on June 18 Barry did threaten employees with reprisals, including discharge, should they continue with their union activity. There is nothing, however, in any of the witnesses' testimony to indicate that Barry made any kind of implied promise of increased benefits and improved working conditions or solicited complaints and grievances.

It is also alleged that on June 23 Barry threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative. Bennett did testify that on that day Barry told several of the maintenance employees "the only thing y'all are going to get out of this union shit is hurt." Inasmuch as this statement was made to maintenance employees in the context of the confrontation that they were then having with the Company concerning the matter of taking beeper assignments, I conclude that in fact such amounted to a generalized threat. It was therefore violative of Section 8(a)(1), notwithstanding that the ultimate issue over which the three employees were discharged was their having engaged in unprotected activity.

b. *Patricia Artigues*

On the afternoon of June 18 Gilbert was called to the office of the Respondent's president. Their conversation, she testified, lasted about an hour. Although she stated that their talk about the Union lasted only about 3 minutes, it is clear that the purpose of this meeting with Gilbert related specifically to his posting the notice of the union meeting. She did not deny that she told him that a union meeting of employees was against company policy. She admitted saying that employees could be terminated if there was a "lack of communication." She also admitted asking him which employees were involved, and then followed by asking him what his grievances were. His grievance then was the Respondent had failed to give him a 50-cent-an-hour pay increase. (This was before Neville told employees that the Company was violating the Fair Labor Standards Act.)

Inasmuch as Gilbert's testimony was largely undisputed by Artigues, although there are some differences in emphasis, I find that on June 18, as alleged, the Respondent through Artigues orally interrogated an employee concerning his and others' union activity, orally threatened to discharge employees because of their union or other protected activity, and solicited employee complaints and grievances. All of this, I conclude, was violative of Section 8(a)(1) of the Act.

c. *The vacation and holiday notice*

On August 1 the Respondent posted a notice on the subject of vacation, sick leave, and holiday pay for both the salaried and full-time maintenance (hourly and weekly) employees. The memorandum for maintenance employees has the following:

> Note—This new policy on paid vacation applies to hourly, full-time maintenance personnel who are eligible for a vacation in 1980.

Even though there is the handwritten note "revised" by the date of "8/1/80," it is clear that the policy was posted on August 1 and did by its terms offer new employees 2 weeks' vacation after 1 year rather than 1 week.

Although the Respondent contends that the change in policy occurred in March and it was through inadvertence that the change was incorrectly posted, I find that the policy was announced to employees following the beginning of the organizational campaign, before the election and during the time when there were new employees as striker replacements. Accordingly, I conclude that this announcement of the change in vacation policy made particularly applicable to striker replacements necessarily had an intimidating and coercive effect on the rights of employees to engage in protected concerted activity and was therefore violative of Section 8(a)(1).

4. The refusal to bargain

Undeniably, on or about November 1 the Respondent announced a change in its health, accident, and life insurance plan to all employees, including those in the bargaining unit. The Respondent unilaterally and without negotiating with the Union changed the plan by assuming all of the premiums.

The Union had not at the time demonstrated that it represented a majority of the employees in the bargaining unit and the matter of the election was still unresolved because of the pending challenges. Thus the Respondent contends that it was not obligated to bargain with the Union.

Citing *Allis-Chalmers Corporation*, 234 NLRB 350 (1978), the General Counsel contends that pending postelection challenges an employer may not with impunity institute unilateral changes. In *Allis-Chalmers*, however, the postelection issue involved the employer's objections to conduct affecting the results of the election which the union had won. Challenged ballots were not determinative. In *Allis-Chalmers* the employer knew the union had been designated by a majority of those voting and would be certified, absent the election being set aside. The employer raised the objection issue and therefore acted at its peril should that issue be resolved against it.

Such is not the case here. The vote here did not demonstrate the Union's majority status. Challenges are determinative, some of which were made by the Union. Thus even if it is finally found that a majority voted for the Union, I conclude that the Respondent did not commit an unfair labor practice by making the unilateral change. *Cooks Markets, Inc.*, 159 NLRB 1182 (1966).

IV. THE CHALLENGES

As indicated above, the principal issue with regard to the challenged ballots concerns whether the strike of June 23 was an economic or an unfair labor practice strike. Having concluded that it was and continued to be an economic strike, it follows that the striking employees could be permanently replaced and those replacements eligible to vote, absent a showing by the Union that they were hired on a temporary basis. *Kable Printing Company*, 238 NLRB 1092 (1978). There is no such evidence

here, hence the union challenges to the votes of strike replacements should be overruled, and the ballots of the following employees counted: Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, and Richard Williams.

The Employer challenged the ballots of James Roberson, David Capretto, Jeff Johnson, Paul David, Willie Clark, Frank Carroll, and Mike Giroux because they were "employed elsewhere." There is a presumption of continued eligibility for economic strikers, which is not rebutted by the mere fact that one takes a job elsewhere. *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). And here there is otherwise no evidence that these employees abandoned their employment. Quite the contrary, they all appeared at the polls and voted. Accordingly, I conclude that the challenges to these ballots should be overruled and the votes counted.

The Union also challenged the ballot of Robert Gossen because he is a supervisor. I find insufficient evidence in the record to sustain the Union's position that he has the authority set forth in Section 2(11) of the Act. On the other hand Gossen's testimony concerning his duties, as an onsite maintenance man, was credible. Accordingly, I recommend that the challenge to this ballot be overruled.

The Union challenged the ballot of Henry Gonzales, Jr. Although he was challenged as a "permanent replacement" the record supports the conclusion that he was, in fact, a security guard. Gonzales was a member of the New Orleans police department and was hired, according to Artigues, as a security guard and also to do small amounts of maintenance. While she testified that he went on full-time status in July, as a maintenance man, she did not testify that he gave up his guard duties. Some days before the election he escorted Gilbert off the Respondent's premises after flashing his badge. Thus even if Gonzales began putting in more time as a maintenance employee in July, the evidence reveals that he continued to work as a guard. Therefore he was ineligible to vote and the challenge to his ballot should be sustained.

And the Union challenged the ballot of Lloyd Hurlbert because he said he was a porter. This, of itself, is an insufficient basis to deny a voting employee the right to have his ballot counted. There is no evidence concerning his duties and only one hearsay statement that he was a porter—a job classification excluded from the bargaining unit. I recommend that the challenge to his ballot be overruled.

Finally, having concluded that Bennett, Gilbert, and Toups were discharged for cause, I conclude that the challenges to their ballots be sustained.

I recommend that Case 15-RC-6650 be remanded to the Regional Director for Region 15, that the challenges overruled be opened and counted, that a revised tally of ballots issue, and that the Regional Director issue the appropriate certification.

V. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above occurring in connection with the Respondent's business have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

VI. THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Further having concluded that certain challenges be overruled, I recommend that Case 15-RC-6650 be remanded to the Regional Director for purposes of opening and counting these ballots, issuing a revised tally of ballots and certifying the results of the election or the Union as the bargaining representative, as the case may be.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Lake Development Management Company, Metairie, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or other reprisals should they engage in union or other concerted activity for their mutual aid or protection.

(b) Interrogating employees concerning their interest in or activity on behalf of the Union.

(c) Soliciting grievances from employees to discourage their activity on behalf of the Union.

(d)Instituting or announcing the institution of benefits to employees during the course of a union organizational campaign.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[6]

2. Take the following affirmative action:

(a) Post at its Metairie, Louisiana, facility copies of the attached notice marked "Appendix."[7] Copies of the

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] The unfair labor practices engaged in by the Respondent in this matter are not so pervasive as to suggest a proclivity to violate the Act. Therefore the narrow injunctive relief is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case 15-RC-6650 be remanded to the Regional Director for Region 15 to open and count the following ballots: Gaylord Baham, Jr., Lionel Boudreaux, David Capretto, Frank Carroll, Dennis Chun, Willie Clark, Paul David, Mario Garetano, Mike Giroux, Robert Gossen, Lloyd Hurlbert, Jeff Johnson, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, James Roberson, Joseph West, Richard Williams, and Whitfield Clark; and to issue a revised tally of ballots and appropriate certification.

IT IS FURTHER ORDERED that the complaint in all respects not found herein is dismissed.